OSSG Management Sdn Bhd v Platinum Eden Asset Management Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-378–08 OF 2018
ONG CHEE KWAN JC
2 JUNE 2021

Civil Procedure — Committal proceedings — Application for — Whether the respondent failed to meet the obligation to make payment as under the consent judgment — Whether there were other alternative remedies to enforce consent judgment — Whether penal notice was endorsed in the consent judgment — Rules of Court 2012 O 45 rr 1 & 7 & O 52 r 3

This was an application for an order of committal by the applicant against the respondents or non-compliance of the consent order dated 25 October 2019 ('consent judgment'). By the share purchase agreement between applicant and respondents, the applicant agreed to purchase from the first respondent and the first respondent agreed to sell to the applicant 6,300,000 shares ('the sale shares') in one ARL Homecomm Sdn Bhd ('ARL Homecomm'). Pursuant to the share purchase agreement, the applicant had paid a sum of RM2m upon the execution of the share purchase agreement to the first respondent on or around 15 May 2017 to 17 May 2018; and a sum of RM3m as part payment of the Purchase Consideration by way of instalments as was mutually agreed between the first respondent and the applicant. On 18 May 2018, the applicant sent letter to the second respondent (as solicitors for the first respondent) stating: (a) the applicant was unable to proceed with the share purchase agreement and gave notice to the first respondent that the share purchase agreement was terminated forthwith; and (b) in the applicant offered the first respondent the right to forfeit the sum of RM2m which was paid as agreed liquidated damages. The parties thereafter entered into the consent judgment in Suit No WA-22NCC-378-08 of 2018 as full and final settlement of all claims and/or action which arose from and/or concerning the action and/or the share sale agreement. It was an agreed term of the consent judgment that a sum of RM1.8m. was to be paid by the first respondent to the applicant in one lump sum ('settlement sum') within a period of three months from the date of the consent judgment ('the settlement period'). On 10 February 2020, the first respondent through its solicitors sent a letter to the applicant's solicitors invoking the relevant term of the consent judgement in respect of the first extended settlement period. According to the first respondent, they were taking all the necessary steps to pay the settlement sum to fulfil its obligation under the consent judgement and would do so within the first extended settlement period. However, on 18 March 2020 the Government of Malaysia had

announced the implementation of Movement Control Order ('MCO') prompted by the Covid-19 pandemic in the country. The said event had resulted in a temporary halt to businesses including the first respondent's businesses. In response to the first respondent's request to extend the payment period, the applicant was agreeable to extend the first extended settlement period for another one month ie on or before 22 May 2020 provided that the first respondent could produce documentary evidence pertaining to the status of the sale of the ARL Homecomm shares. Despite the numerous extensions, the first respondent had failed to pay the settlement sum to the applicant. The non-compliance was in relation to the failure to make payment within the time stipulated by the consent judgment. The application was premised on these issues: (a) whether the respondent had failed to meet the obligation to make payment as under the consent judgment; (b) whether there were other alternative remedies to enforce consent judgment; and (c) whether penal notice had been endorsed in the consent judgment.

Held, dismissing application for order of committal ('encl 70') with costs:

(1) The failure to make the payment under the terms of the consent judgment did not meet the strict requirements for this court to grant an order of committal against the respondents. Thus, there must be evidence to show that the judgment debtor had refused or neglected to pay the judgment sum within a time stipulated in the judgment or order. In this case, all that the applicant had shown was that the first respondent had failed to make the payment of the settlement sum under the consent judgment. No evidence had been adduced to show that the failure to meet the obligations under the consent judgment by the first respondent was willful (see paras 29, 31 & 34).

(2) What can be discerned from the application was the fact that the first respondent was taking steps to fulfil its obligations under the consent judgment. More specifically, prior to the second extended settlement period, the first respondent informed the applicant vide an email dated 14 April 2020, that due to the implementation of MCO, the first respondent was unable to close the deal in respect of the sale of the ARL Homecomm shares. The applicant had in fact satisfied itself of the first respondent's effort to sell its ARL Homecomm shares before agreeing to the second extended settlement period (see paras 35–36).

(3) When contempt was based on the failure to pay, willfulness must be established by some evidence that the first respondent had or had the ability to pay the amount owing but deliberately failed to do so. Such ability to pay may be demonstrated by adducing evidence that the first respondent had income or cash sufficient to pay or that there are steps that the first respondent can take that would allow it to pay the settlement sum. To prove the applicant's case beyond reasonable doubt, it was crucial

for the applicant to show that at all material times, the first respondent was able to pay the Settlement Sum yet unwilling to do the same. The applicant had failed to show a refusal or neglect to pay (see paras 39, 43 & 46).

(4) The applicant had also failed to indorse the consent judgment with was the requisite penal notice pursuant to O 45 r 7(4) of the ROC 2012. The failure of the applicant to endorse the penal notice on the consent judgement was fatal. The consent judgment laid down the obligation of the first respondent to make payment of the settlement sum to the applicant within the settlement period and/or the extended settlement period. Hence, the indorsement of the penal notice under O 45 r 7(4) of the Rules was a mandatory prerequisite before the same could be executed via committal proceedings (see paras 52 & 56).

[Bahasa Malaysia summary

Ini adalah permohonan untuk perintah komital oleh pemohon terhadap responden-responden di atas ketidakpatuhan kepada penghakiman persetujuan bertarikh 25 Oktober 2019 ('penghakiman persetujuan'). Melaui perjanjian pembelian saham diantara pemohon dan responden-responden, pemohon bersetuju untuk membeli daripada responden pertama 6,300,000 unit saham di ARL Homecomm Sdn Bhd ('ARL Homecomm'). Melalui perjanjian pembelian saham tersebut, pemohon membyar jumlah sebanyak RM2 juta setelah perjanjian tersebut dimeterai pada 15 Mei 2017 hingga 17 May 2018; jumlah sebanyak RM3 juta sebagai bayaran sebahagian unit saham tersebut sebagai bayaran ansuran. Pada 18 May 2018, pemohon telah menghantar surat kepada responden kedua (peguam cara responden pertama) menyatakan bahawa: (a) pemohon tidak dapat meneruskan perjanjian pembelian saham dan memberikan notis kepada responden pertama untuk penamatan perjanjian tersebut; dan (b) pemohon menawarkan responden pertama hak untuk memperoleh kembali RM2,000,00 yang telah dibayar sebagai jumlah kerugian. Pihak-pihak kemudiannya memasuki penghakiman persetujuan di Guaman No WA-22NCC-378-08 of 2018 sebagai penyelesaian penuh dan muktamad keseluruhan tindakan yang berdasarkan perjanjian pembelian saham tersebut. Terma yang dipersetujui adalah jumlah RM1.8 juta dibayar oleh responden pertama secara sekaligus dalam masa tiga bulan dari tarikh penghakiman persetujuan ('tempoh penyelesaian'). Pada 10 Februari 2020, responden pertama melalui peguamcaranya telah membangkitkan terma-terma relevan di dalam penghakiman persetujuannya untuk memenuhi keperluan penangguhan tempoh penyelesaian kali pertama. Menurut responden pertama, mereka telah mengambil langkah yang perlu untuk membayar jumlah tersebut. Namun, pada 18 Mac 2020, Kerajaan Malaysia telah mengisytiharkan Perintah Kawalan Penggerakan ('PKP') akibat pandemik di negara ini. PKP ini telah menyebabkan pemberhentian sementara kepada perniagaan termasuk perniagaan responden pertama. Sebagai tindak

balas kepada permintaan responden pertama untuk melanjutkan tempoh penyelesaian, pemohon telah bersetuju untuk melanjutkan tempoh penyelesaian lanjutan pertama untuk satu bulan lagi iaitu pada atau sebelum 22 Mei 2020 dengan syarat bahawa responden pertama mengemukakan bukti dokumentari mengenai status penjualan saham ARL Homecomm. Walaupun terdapat banyak lanjutan, namun responden pertama gagal membayar jumlah penyelesaian kepada pemohon. Ketidakpatuhan was berhubung dengan kegagalan untuk membuat pembayaran dalam masa yang ditetapkan oleh penghakiman persetujuan. Permohonan tersebut difailkan atas isu-isu ini: (a) sama ada responden telah gagal memenuhi kewajipan untuk membuat pembayaran sebagaimana dipersetujui di dalam penghakiman persetujuan; (b) sama ada terdapat remedi alternatif lain untuk menguatkuasakan penghakiman persetujuan; dan (c) sama ada notis penal dimasukkan di dalam penghakiman persetujuan.

Diputuskan, menolak permohonan untuk perintah komital ('lampiran 70') dengan kos:

(1) Kegagalan untuk membuat pembayaran di bawah terma penghakiman persetujuan tidak memenuhi keperluan ketat untuk mahkamah ini untuk membenarkan perintah komital terhadap responden-responden. Oleh itu, terdapat bukti untuk menunjukkan bahawa penghutang penghakiman enggan atau mengabaikan pembayaran jumlah penghakiman persetujuan dalam masa yang ditetapkan dalam penghakiman atau perintah. Di dalam kes ini, responden pertama telah gagal untuk membuat pembayaran jumlah penyelesaian di bawah penghakiman persetujuan. Tiada bukti yang menunjukkan bahawa kegagalan untuk memenuhi kewajipan di bawah penghakiman persetujuan oleh responden pertama adalah disengajakan (lihat perenggan 29, 31 & 34).

(2) Permohonan ini menunjukkan bahawa responden pertama telah mengambil langkah-langkah untuk memenuhi kewajipannya di bawah penghakiman persetujuan. Khususnya, sebelum tempoh penyelesaian yang dilanjutkan, pihaknya memaklumkan kepada pemohon melalui emel bertarikh 14 April 2020, bahawa disebabkan pelaksanaan PKP, responden pertama tidak dapat memeterai perjanjian berkenaan dengan penjualan saham ARL Homecomm. Pemohon sebenarnya berpuas hati dengan usaha ARL Homecomm untuk menjual saham ARL Homecomm sebelum bersetuju dengan tempoh penyelesaian lanjutan kedua (lihat perenggan 35–36).

(3) Apabila penghinaan mahkamah dimohon berdasarkan kegagalan pembayaran hutang, pemohon mestilah menunjukkan bukti bahawa responden pertama mempunyai keupayaan untuk membayar jumlah yang terhutang tetapi telah gagal berbuat demikian. Keupayaan untuk

membayar boleh ditunjukkan dengan melampirkan bukti bahawa pendapatan atau wang tunai yang mencukupi untuk membayar atau bahawa terdapat langkah-langkah yang boleh diambil oleh responden pertama yang akan membolehkan pembayaran jumlah penyelesaian. Untuk membuktikan kes pemohon di luar keraguan yang munasabah, adalah penting bagi pemohon untuk menunjukkan bahawa pada setiap masa material, responden pertama mampu membayar Jumlah Penyelesaian tersebut tetapi tidak mahu melakukan perkara itu. Pemohon gagal untuk menunjukkan keengganan atau pengabaian di pihak responden pertama untuk membuat pembayaran (lihat perenggan 39, 43 & 46).

(4) Pemohon juga gagal memasukkan adalah notis penal di dalam penghakiman persetujuan yang diperuntukkan di dalam A 45 k 7(4) KKM 2012. Kegagalan pemohon ini adalah fatal. Penghakiman persetujuan ini meletakkan kewajipan responden pertama untuk membuat pembayaran jumlah penyelesaian kepada pemohon dalam tempoh penyelesaian dan/atau tempoh penyelesaian yang dilanjutkan. Oleh itu, pengendorsan notis penal di bawah A 45 k 7(4) KKM 2012 adalah prasyarat mandatori sebelum prosiding ini dimulakan (lihat perenggan 52 & 56).]

Cases referred to

Bramblevale Ltd, Re [1970] Ch 128, CA (refd)
DP Vijandran v Majlis Peguam [1995] 2 MLJ 391, HC (refd)
Greenpower Value Sdn Bhd v Universal Trustee & Ors [2020] MLJU 1051, HC (refd)
Kumaraendran, An Advocate & Solicitor, Re [1975] 2 MLJ 45 (refd)
Lee Lay Ling v Goh Kim Nam (Cheah Pei Ching, co-respondent) [2014] 8 MLJ 805, HC (refd)
Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor [1997] 2 MLJ 472, CA (refd)
Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor [2003] 4 MLJ 284; [2003] 4 CLJ 743, CA (refd)
London and Paris Banking Corporation, In re (1874) LR 19 Eq 444 (refd)
Mok Kah Hong v Zheng Zhuan Yao [2016] 3 SLR 1, CA (refd)
Ng Tai Tuan v Chng Gim Huat Pte Ltd [1990] 2 SLR(R) 231, HC (refd)
Peka Pic Sdn Bhd v Louis bin Md Zain [2018] MLJU 635, HC (refd)
Quintin Dick, Re [1926] Ch 992, Ch D (refd)
Tan Kang Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors [2015] 4 CLJ 113, HC (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458, FC (refd)

Legislation referred to

Rules of Court 2012 O 45 rr 1(1)(c), 5, 5(1)(a), 7(4), O 52 rr 3, 4, 6(3)

JH Chai (Wilson Lim with him) (Lim, Chan & Assoc) for applicant/plaintiff.
Mohd Faiz Iskandar Hamzah (Arief & Iskandar) for the third respondent.

Ong Chee Kwan JC:

INTRODUCTION

[1] This is the judgment of the court in respect of the applicant's application under O 52 r 4 of the Rules of Court 2012 ('the Rules') seeking an order that the respondents be committed for contempt of court for non-compliance of the consent order dated 25 October 2019 ('consent judgment'). The applicant had obtained leave from this court to proceed with the committal application pursuant to O 52 r 3 of the Rules on 3 December 2020.

[2] The non-compliance is in relation to the failure to make payment within the time stipulated by the consent judgment.

BACKGROUND FACTS

[3] By a share purchase agreement dated 17 May 2017 ('share purchase agreement'), the applicant agreed to purchase from the first respondent and the first respondent agreed to sell to the applicant 6,300,000 shares ('the sale shares') in one ARL Homecomm Sdn Bhd ('ARL Homecomm'), a private limited company incorporated under the laws of Malaysia.

[4] At all material times, the first respondent is the legal and beneficial owner of the sale shares and the second respondent, a solicitors from Tetuan Abu Talib Shahrom had represented the first respondent in the share purchase agreement as the vendor's solicitors. The applicant, in turn, was represented by its solicitors, Messrs TS Liew, Nurzila & Co ('Messrs TSLN & Co'). The second respondent is also a director of the first respondent.

[5] Pursuant to the share purchase agreement, the applicant had paid:

(a) a sum of RM2m upon the execution of the share purchase agreement under cl 2.2.1(a) therein to the first respondent on or around 15 May 2017 to 17 May 2018; and

(b) a sum of RM3m as part payment of the purchase consideration under cl 2.2.1(b) of the share purchase agreement by way of instalments as was mutually agreed between the first respondent and the applicant.

[6] On 18 May 2018, the applicant via Messrs TSLN & Co issued a notice of termination ('the notice of termination') to the second respondent (as solicitors for the first respondent) stating, amongst others:

(a) the applicant was unable to proceed with the share purchase agreement and gave notice to the first respondent that the share purchase agreement was terminated forthwith; and

(b) in accordance with cl 8.3(a)(i) of the share purchase agreement, the applicant offered the first respondent the right to forfeit the sum of RM2m which was paid under cl 2.2.1(a) thereto as agreed liquidated damages.

[7] The parties thereafter entered into the consent judgment in Suit No WA-22NCC-378–08 of 2018 ('Suit 378') as full and final settlement of all claims and/or action which arose from and/or concerning the action and/or the share sale agreement. It was an agreed term of the consent judgment that a sum of RM1.8m is to be paid by the first respondent to the applicant in one lump sum ('settlement sum') within a period of three months from the date of the consent judgment ('the settlement period'). In the event the first respondent fails to pay the settlement sum within the settlement period, a further extension of time of three months shall be granted to the first respondent ('the first extended settlement period').

[8] In accordance with the consent judgment, the applicant withdrew its action against the first respondent and second respondent in its entirety with no order as to costs and without liberty to file afresh. The first respondent and the second respondent also withdrew their respective counterclaims against the applicant in its entirety with no order as to costs and without liberty to file afresh.

[9] On 10 February 2020, the first respondent through its solicitors sent a letter to the applicant's solicitors invoking the relevant term of the consent judgment in respect of the first extended settlement period. According to the first respondent, they were taking all the necessary steps to pay the settlement sum to fulfil its obligation under the consent judgment and would do so within the first extended settlement period.

[10] However, on 18 March 2020 the Government of Malaysia had announced the implementation of Movement Control Order ('MCO') prompted by the Covid-19 pandemic in the country. The said event had resulted in a temporary halt to businesses including the first respondent's businesses.

[11] Due to the inevitable deprivation of the first respondent's valuable time

to meet the deadline for the first extended settlement period, the first respondent's solicitors then sent an email on 14 April 2020 to the applicant's solicitors seeking for the latter's indulgence for a further extension of time from the date of the first extended settlement period.

[12] More specifically, according to the first respondent the implementation of MCO and also the subsequent proclamation of emergency had severely affected the first respondent's businesses including ARL Homecomm's business. At all material times, the first respondent had intended to sell the shares of ARL Homecomm ('the ARL Homecomm shares') which it owned as a means to pay the settlement sum and to fulfill its obligations under the consent judgment.

[13] In response to the first respondent's request, the applicant was agreeable to extend the first extended settlement period for another one month ie on or before 22 May 2020 provided that the first respondent could produce documentary evidence pertaining to the status of the sale of the ARL Homecomm shares.

[14] To meet the applicant's request, the first respondent furnished two documents vide its email dated 21 April 2020 — the first being a letter from one Amanie International Consulting Sdn Bhd ('Amanie') dated 16 December 2019 and the other was a letter from ACGL Consulting Sdn Bhd ('ACGL') dated 22 February 2020 indicating the status of the intended sale of the ARL Homecomm shares at that point of time.

[15] Upon receiving the above documents, the applicant through its solicitors then confirmed the extension of time vide a letter dated 22 April 2020 for the first respondent to pay the settlement sum on or before 22 May 2020 ('the second extended settlement period').

[16] Notwithstanding the second extended settlement period, on 21 May 2020, the first respondent's solicitors requested for yet another extension of time ie until 31 July 2020 to pay the settlement sum which is to be computed from the last date of second extended settlement period. According to the first respondent, the extension was needed due to the fact that during the said time, the deal to sell the ARL Homecomm shares had been affected by the further extensions of MCO by the Malaysian Government.

[17] Although not obliged to do so, the said request for the further extension was agreed to by the applicant vide its letter dated 22 May 2020 ('the third extended settlement period').

[18] On 30 July 2020, the first respondent sent a letter to the applicant

informing that the first respondent was in the midst of finalising the sale of the ARL Homecomm shares for an estimated amount of RM30m to a company under the name of OCK Telco Infra Sdn Bhd. However, due to then numerous extensions of the MCO, the first respondent required again another extension of time to pay the settlement sum pending the completion of sale of the ARL Homecomm shares. The first respondent also stated that it had applied for a loan from the financial institutions in order to satisfy the settlement sum.

[19] Upon consideration of the above said letter by the first respondent, the applicant had agreed to grant further extension of time vide its solicitors' letter dated 5 August 2020 starting from the last date of the third extended settlement period until 1 September 2020 ('the fourth extended settlement period') to enable the first respondent to pay the settlement sum.

[20] Despite the aforesaid extensions, the first respondent had failed to pay the settlement sum to the applicant. Thus, on 11 September 2020, the applicant personally served the first respondent a show cause letter and the same document was also personally served to the second respondent on 6 October 2020. The applicant however failed to personally serve the show cause letter to the third respondent until after the appointment of the third respondent's solicitors for the purposes of this application.

[21] Upon obtaining leave from this court under encl 69 to commence committal proceedings against the respondents herein, the applicant then filed its application in encl 70 under O 52 r 4 of the Rules against the respondents.

[22] At the hearing, the first and second respondents were unrepresented and were not present. The court had proceeded based on the submission of the third respondent in the absence of the first and second respondents.

[23] After hearing oral submissions from counsel and based on the written submissions and the relevant cause papers filed herein, this court dismissed the applicant's application in encl 70 for committal with costs.

THE GROUNDS

[24] I would begin by referring to the statement of the substantive and adjectival aspects of committal proceedings which is found in the judgment of our former Chief Justice of the Federal Court, YAA Tun Ariffin bin Zakaria in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458:

> [26] Contempt has been reclassified either as (1) a specific conduct of contempt for breach of a particular court order; or (2) a more general conduct for interfering with the due administration or the course of justice. This classification is better explained

in the words of Sir Donaldson MR in Attorney-General v Newspaper Publishing Plc at p 362: ...

[29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance. In this regard, Cross J in Re B (JA) (An Infant) [1965] 1 Ch 1112 had this to say: Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations ...

[25] There are two stages to the committal of a non-complying party. The first stage involves the leave application to commence committal proceedings against the respondent under O 52 r 3 of the Rules. Once leave has been granted, the second stage involves the actual application for an order of committal against the respondent.

[26] The threshold for the grant of leave at the first stage of the committal proceedings is that of a prima facie case of contempt. To this end, the court will not venture into or decide the substantive merits of the committal application which is properly the subject matter for adjudication at the second stage which is the actual application for the order of committal.

[27] Order 52 r 6(3) makes it clear that, unless the court hearing the application gives leave, the applicant at the hearing of the application for an order of committal can only rely on the grounds set out in the statement accompanying the ex parte application for leave to apply for a committal order.

[28] In the present case, the ground stated in the applicant's statement filed in support of the ex parte application for leave is that the first respondent had failed to comply with its obligation to pay the settlement sum under the consent judgment notwithstanding the numerous extensions of time granted.

[29] With respect to learned counsel for the applicant, the failure to make the payment under the terms of the consent judgment without more does not meet the strict requirements for this court to grant an order of committal against the respondents.

[30] O 45 r 1(1)(c) of the Rules states that an judgment or order for the payment of money may be enforced by way of an order of committal only in a case in which O 45 r 5 applies. Order 45 r 5(1)(a) in turn applies only when 'a person required by a judgment or order to do an act within a time specified in the judgment or order *refuses or neglects* to do it'.

[31] Thus, there must be evidence to show that the judgment debtor has refused or neglected to pay the judgment sum within a time stipulated in the judgment or order.

[32] In *DP Vijandran v Majlis Peguam* [1995] 2 MLJ 391, the court held that '[t]he ordinary meaning of the word 'refuse' is to decline to give', and that 'failure' is not synonymous with refusal'. In *Re Quintin Dick* [1926] Ch 992, Romer J held that the term 'refuse or neglect' was not equivalent to 'fail or omit'. The former implied a conscious act of volition whereas the latter did not.

[33] In *Ng Tai Tuan v Chng Gim Huat Pte Ltd* [1990] 2 SLR(R) 231, Chao Hick Tin JC (as he then was) expressed the view that the word 'neglect' necessarily implies some element of fault. He cited the case of *In re London and Paris Banking Corporation* (1874) LR 19 Eq 444 where Sir G Jessel MR said, at p 446:

> ... the word 'neglected' is not necessarily equivalent to the word 'omitted'. Negligence is a term which is well known in law. Negligence in *paying* a debt on demand, as I understand, is omitting to *pay* without reasonable excuse. Mere omission by itself does not amount to negligence.

[34] In our present case, all that the applicant has shown is that the first respondent had failed to make the payment of the settlement sum under the consent judgment. No evidence has been adduced to show that the failure to meet the obligations under the consent judgment by the first respondent was willful.

[35] Indeed, from the narration of the facts in the statement filed in support of the ex parte application for leave, what can be discerned is the fact that the first respondent was taking steps to fulfil its obligations under the consent judgment.

[36] More specifically, prior to the second extended settlement period, the first respondent informed the applicant vide an email dated 14 April 2020, inter alia, that due to the implementation of MCO, the first respondent was unable to close the deal in respect of the sale of the ARL Homecomm shares. The applicant had in fact satisfied itself of the first respondent's effort to sell its ARL Homecomm shares before agreeing to the second extended settlement period.

[37] The first respondent had alluded to the COVID-19 pandemic and the implementation of the MCO from 18 March 2020 until May 2020 and thereafter further extensions to restrictions in businesses as the reason for its inability to close the sale of the ARL Homecomm shares notwithstanding the

numerous extensions of time granted by the applicant. A

[38] There is no evidence before this court that the problems encountered by the first respondent as narrated were not genuine. The applicant has not deem it fit to make an application to cross-examine the respondents either to challenge the truth of the assertions made or to establish the financial position of the first respondent. B

[39] There is no evidence that the first respondent has the necessary means without the sale of the ARL Homecomm shares to meet its obligations to pay the settlement sum. When contempt is based on the failure to pay, wilfulness must be established by some evidence that the first respondent has or had the ability to pay the amount owing but deliberately failed to do so. Such ability to pay may be demonstrated by adducing evidence that the first respondent has income or cash sufficient to pay or that there are steps that the first respondent can take that would allow it to pay the settlement sum. C D

[40] In this connection, learned counsel for the applicant contended that the first respondent had failed to take steps to recover from its directors, namely, the second and third respondents monies that were paid over to them by the first respondent from the purchase consideration for the sale shares received from the applicant which had been forfeited by the first respondent under the share purchase agreement. E

[41] However, there is nothing before this court to suggest that the payments by the first respondent to the second and third respondents were wrongful and that the first respondent has a legal right to recover such payment from them. Indeed, there is no dispute that the applicant was aware that the first respondent had already paid out the monies to the second and third respondents when the consent judgment was entered. Again no attempt was made by the applicant to cross-examine any of the respondents on the payments. F G

[42] It is trite law that the burden of proof for contempt proceedings is identical to those in criminal proceedings ie the applicant is under the duty to prove its case beyond reasonable doubt (see *Re Bramblevale Ltd* [1970] Ch 128, per Lord Denning MR and *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 2 MLJ 472). H

[43] In order to prove the applicant's case beyond reasonable doubt, it is crucial for the applicant to show that at all material times, the first respondent is able to pay the settlement sum yet unwilling to do the same. I

[44] In *Lee Lay Ling v Goh Kim Nam (Cheah Pei Ching, co-respondent)*

[2014] 8 MLJ 805 the High Court in Penang ruled against the petitioner/wife's application for contempt against the respondent/Husband on the basis that there was no attempt by the former to cross-examine the latter in respect of the respondent/husband's averment of impecuniosity in his affidavits. The cross-examination by the petitioner/wife is crucial as the burden to prove beyond reasonable doubt for contempt proceedings lies on the former and not the respondent/husband.

[45] Similarly, in the case of *Peka Pic Sdn Bhd v Louis bin Md Zain* [2018] MLJU 635, the learned judicial commissioner Wong Chee Lin (as she then was) ruled, inter alia, the followings:

> [31] In the present case, I find that it would not be appropriate to commit the Defendant to prison for contempt without clear proof that he was able to pay the sum stipulated in the consent judgment. Since the Plaintiff has not shown beyond reasonable doubt that the Defendant was able to pay the sum stipulated in the consent judgment, I would have dismissed the committal application against the Defendant on that ground also.

[46] Quite apart from the fact that the applicant has failed to show a refusal or neglect to pay, there is another reason why the committal application should be dismissed.

[47] As can be seen, the applicant had chosen to commence this committal proceedings against the respondent after the first respondent had failed to pay the settlement sum upon the expiry of the fourth extended settlement period on 1 September 2020. Leave to commence committal proceeding was on 25 November 2020, about three months later.

[48] This is not a case where there are no viable alternatives for the recovery of the settlement sum apart from enforcement by committal which should be a remedy of last resort. During oral submissions, it was disclosed to the court that the applicant still has in its possession certain ARL Homecomm shares belonging to the respondent which the applicant is entitled to exercise a lien. The value of these shares is not insignificant.

[49] Further, if the applicant is of the view that the first respondent's payment of the monies from the purchase consideration under the share purchase agreement to the second and third respondents are recoverable by the first respondent, the applicant can opt to enforce the consent judgment by applying to the court for the monies owed by the second and third respondents to be garnished.

[50] To be clear, I am not suggesting for a moment that the applicant must exhaust all alternative remedies that exists or available before resorting to

committal proceedings. There is a distinction between committal proceedings being a remedy of last resort and the requirement of having to exhaust all other alternative remedies before committal proceedings can be resorted to. The former suggests that if there exists alternative enforcement which are meaningful and viable, the judgment creditor ought to resort to the same before commencing committal proceedings as the first port of call to recover the judgment debt (see *Mok Kah Hong v Zheng Zhuan Yao* [2016] 3 SLR 1).

[51] In *Tan Kang Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors* [2015] 4 CLJ 113 the Judicial Commissioner Wong Kian Kheong (as he then was), inter alia, adopted this principle in the following passage of his judgment:

> [69] The power to punish for contempt of court should be used sparingly and as a last resort in the interest of administration of justice where all other reasonable avenues have failed.
>
> ...
>
> [72] As the applicant has a *reasonable alternative* of complaining to SSM in respect of the investigative audit, the applicant should not have resorted to committal proceedings in this case. (Emphasis added.)

[52] Finally, the applicant has also failed to indorse the consent judgment with the requisite penal notice pursuant to O 45 r 7(4) of the Rules. The failure of the applicant to indorse the penal notice on the consent judgment is fatal.

[53] Order 45 r 7(4) of the Rules provides as follows:

> Service of copy of judgment or order prerequisite to enforcement under rule 5 (O 45, r 7)
>
> (1) ...
>
> (2) ...
>
> (3) ...
>
> (4) There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served —
>
> (a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and
>
> (b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it.

[54] Penal indorsement in the consent judgment is a mandatory precondition as the same requires the parties to do certain act within a specified time. In *Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 MLJ 284; [2003] 4 CLJ 743, the Court of Appeal ruled, inter alia, the followings:

> Rule 7(4) provides that it is only where the order of court is one that must specify the time period within which an act must be done that can be indorsed with the penal notice. Rule 7(2)(b) provides that an order shall not be enforced under r 5 unless a copy of the order requiring a person to do an act has been served on him before the expiration of the time within which he was required to do the act. Rule 7(4) deals with the indorsement of the penal notice in the case of service under r 7(2) informing the person on whom the order is served that if he neglects to obey the order within the time specified therein then he is liable to process of execution to compel him to obey it.
>
> *It is therefore clear that where an order of court to do an act must specify the time within which an act is to be done then such time must be specified. It is only in such cases that there can be indorsement with the penal notice. As the indorsement with the penal notice is a prerequisite to the making of a committal order which involves the liberty of the subject it is particularly important that the relevant rules are duly complied with* (see *Nicholls v Nicholls* [1977] 147 NLJ 61; *Allport Alfred James v Wong Soon Lan* [1989] 1 CLJ 271; [1989] 2 CLJ Rep 852). (Emphasis added.)

[55] In *Greenpower Value Sdn Bhd v Universal Trustee & Ors* [2020] MLJU 1051, the High Court in Kuala Lumpur ruled as follows on the issue of penal notice:

> Whether a penal notice is a prerequisite
>
> [47] It is the view of this court if the consent order was meant to have penal implications, it must bear an endorsement of a penal notice. Only by endorsing the penal notice will it give notice to the slleged contemnors that they may potentially face penal sanctions if they fail to abide by the said order. In the Court of Appeal case of *Inter Heritage (M) Sdn Bhd v ASA Sports Sdn Bhd* [2009] 2 CLJ 221, it was held that a failure to endorse a penal notice was fatally flawed. The court held as follows:
>
> > Where the body corporate or alleged contemnor is not severed with the order bearing the appropriate penal endorsement as required under O 45 r 7(4), the application for committal was fatally flawed.
>
> [48] It would however, be an exception if the words of the consent order contain undertakings to court or is coercive in nature.
>
> [49] In *Lee Lay Ling v Goh Kim Nam (Cheah Pei Ching, Co- Respondent)* [2014] 8 MLJ 805, Nanthabalan JC (as he then was) held that even if there was a penal notice, the terms as contained in the order had to be examined for substance and must ultimately be one which was recognised by law as constituting an act, the disobedience of which would attract the penalties or punishment which would flow from its breach or disobedience.

...

[50] Purely based on the facts of this case, this court cannot but arrive at the conclusion that the failure to endorse the consent order with a penal notice is based on the original intention that the consent order was never meant to be enforced by way of committal proceedings. This finding is further fortified when parties then embarked on negotiating the SPA. As such, the failure to have a Penal Notice endorsed on the said consent order was fatal to the case of the banks as laid down in Inter Heritage (M) Sdn Bhd.

[56] In the present case, the consent judgment laid down the obligation of the first respondent to make payment of the settlement sum to the applicant within the settlement period and/or the extended settlement period. Hence, the indorsement of the penal notice under O 45 r 7(4) of the Rules is a mandatory prerequisite before the same can be executed via committal proceedings. The failure to insert the said penal notice is fatal to the application herein.

[57] It is also apposite to conclude this judgment by quoting the following passage by Abdoolcader J (as he then was) in the case of *Re Kumaraendran, An Advocate & Solicitor* [1975] 2 MLJ 45 at p 47 where the learned judge stated thus in relation to the court's power of committal:

... because the power to summarily punish a contemnor for contempt is arbitrary, contrary to natural justice, and far removed from the ordinary processes of the law, it is to be exercised with scrupulous care and only when it is imperative for the court to act immediately; and it must never be invoked unless nothing else will do to protect the ends of justice.

[58] By reason of the aforesaid, this court is constrained to dismiss the applicant's application under encl 70 with costs.

Application dismissed with costs.

Reported by Muhamad Azham Marwan